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Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CAREY WADE NEAL, also
known as Wade Neal,

Debtor.

BAP No. WO-05-029

MARK DUNCAN and CARRIE
DUNCAN,

Plaintiffs – Appellants,

v.

CAREY WADE NEAL,

Defendant – Appellee.

Bankr. No. 03-19877-WV
Adv. No. 03-1513-WV
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, NUGENT, and THURMAN, Bankruptcy
Judges.

NUGENT, Bankruptcy Judge.

Appellants Mark Duncan and Carrie Duncan appeal from a judgment of the United States Bankruptcy Court for the District of Western Oklahoma (the “Judgment”) denying their complaint to except their debt from Cary Wade Neal’s discharge under 11 U.S.C. § 523(a)(2) and § 523(a)(4).¹ The Bankruptcy Court

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Unless otherwise indicated, all future statutory references in text are to
(continued...)

specifically concluded that (1) the Appellants failed to prove that Neal (“Debtor”) had committed actual fraud, and (2), pursuant to Oklahoma law, Debtor’s fiduciary duty to the Appellants applied to only actual lienable claims asserted by vendors against Appellants’ property. We affirm.

I. Background

Debtor filed his Chapter 7 Petition on September 19, 2003. On December 23, 2003, Appellants filed an adversary complaint (“Complaint”) asserting that Debtor owed them \$50,000 arising out of his contract to build their home and seeking to except that debt from discharge under § 523(a)(2) and (4).² The Complaint alleged that Debtor was the trustee of a statutory trust established pursuant to title 42 of the Oklahoma Statutes (“O.S.”) §§ 152 and 153 (the “Construction Trust Fund Statutes”).³ Appellants alleged that Debtor withdrew construction funds in excess of invoices, commingled funds, and refused to provide Appellants with an accounting. Debtor filed his answer on January 23, 2004, stating that all funds he expended were approved and authorized by Appellants. Debtor acknowledged that he “might have” underbid the project, but denied conversion or misapplication of funds.⁴

On September 14, 2005, the bankruptcy court conducted a trial to determine whether Debtor’s conduct violated § 523(a)(2) and (a)(4). Debtor and Appellants entered into a fixed price contract under which Debtor was to construct Appellants’ home for \$566,000.00. Appellants secured a construction loan from Arvest Bank. Construction draws were, upon being appropriately documented, to

¹ (...continued)
the Bankruptcy Code, Title 11 of the United States Code.

² See Complaint at 3, *in* Appellants’ Appendix, Volume I (“App. I”) at 7.

³ *Id.* at 2-3, *in* App. I at 6-7.

⁴ See Answer, *in* App. I at 10-12.

be deposited into Debtor's checking account at Arvest.⁵ According to a bank officer, after several of Debtor's checks were dishonored for insufficient funds and after the filing of a materialman's lien against Appellants' property by Comanche Lumber ("Comanche"), Arvest began to pay vendors directly.⁶

While Debtor was building Appellants' home, he was simultaneously constructing another for himself and a third for another customer.⁷ Debtor admitted commingling funds for his several projects along with personal monies in his Arvest bank account, and that it was "very difficult" for him to ascertain which monies related to which project.⁸ Debtor attempted to attribute his financial difficulties to Arvest's faulty administration of draws from various of his construction projects and Appellants' difficulty with their fax machine and consequent delay in approving invoices.⁹ Nowhere in evidence was there a suggestion that Debtor concealed or misrepresented the commingling of funds.

In an effort to demonstrate that the Debtor had disregarded his fiduciary duties, Appellants presented a considerable body of evidence at trial concerning Debtor's dealings with various subcontractors. Debtor described a \$2,000 payment to him from an air conditioning subcontractor, as "an incentive . . . to forward all of my air conditioning business. [Appellants' home] was the first one that I started doing business with him on."¹⁰ Debtor also recounted terminating his relationship with Gordon Plumbing ("Gordon") due to certain unspecified "discrepancies," and that he subsequently paid a replacement plumber \$2,500 out

⁵ Transcript at 22, *in* App. I at 69.

⁶ *Id.* at 45-46, *in* App. I at 92-93.

⁷ *Id.* at 78-79, *in* App. I at 125-126.

⁸ *Id.* at 116-117, 123-124, *in* App. I at 163-164, 170-171.

⁹ *Id.* at 90, 156-157, 161-164, *in* App. I at 137, 203-204, 208-211.

¹⁰ *Id.* at 114-115, *in* App. I at 161-162; Exhibit 17 *in* App. II.

of a February, 2002, \$9,500 draw that had been earmarked for plumbing work performed by Gordon. Debtor's sole documentary evidence on this point was a lien release from Gordon; he could not demonstrate that he made the \$2,500 payment to the new plumber or explain the disposition of a June, 2002, \$2,000 draw request for Gordon.

Debtor also testified about Comanche, which supplied the lumber for all of Debtor's construction projects and was the sole entity to file a lien stemming from the construction of Appellants' home.¹¹ Between February and April of 2002, Debtor drew \$76,298.02 from Appellants' funds for Comanche expenses, yet paid only approximately \$36,000 to Comanche therefor.¹² Although Arvest had deposited sufficient funds into Debtor's account for Comanche related draws, a check issued by Debtor to Comanche was dishonored for insufficient funds.¹³ Debtor attributed this to his use of Appellants' funds to pay for costs associated with other projects.¹⁴ Debtor also described several credits that he obtained from Comanche from time to time; for price adjustments in the event Debtor found lower prices elsewhere for materials originally purchased from Comanche, for incomplete shipments from Comanche, or for refunds for materials that he returned to Comanche.¹⁵ Debtor admitted that he was overpaid by Appellants for certain Comanche invoices, but also noted that Appellants' contract did not require him to invoice the Appellants at the Debtor's cost.¹⁶

¹¹ *Id.* at 83-108, *in App. I* at 130-155.

¹² *Id.* at 98, 104, *in App. I* at 145, 151; Exhibits 13 and 19, *in App. II*.

¹³ Transcript at 85-89, *in App. I* at 132-136.

¹⁴ *Id.* at 89-90, 118-119, *in App. I* at 136-137, 165-166.

¹⁵ *Id.* at 94-97, *in App. I* at 141-144; Exhibit 13 *in App. II*.

¹⁶ Transcript at 110, 137-138, *in App. I* at 157, 184-185; *see also* Exhibit 2 at 2, ¶ 4(b), *in App. II*.

On June 14, 2002, Comanche filed a lien against Appellants' home in the amount of \$24,924.91.¹⁷ Thereafter, Arvest began issuing checks based on Debtor's draw requests directly to Comanche to satisfy its lien which was ultimately released on February 3, 2003.¹⁸

Appellant Mark Duncan also testified at the trial. In addition to the home's contract price of \$566,000, and not including agreed-upon upgrades, Appellant stated that he spent another \$53,000 on construction of his home.¹⁹ Appellant testified that "at least" \$4,000 of that \$53,000 was expended to discharge Comanche's lien.²⁰ Mr. Duncan stated that when he learned of Comanche's lien, he asked Debtor for copies of Comanche's invoices but Debtor refused to provide them.²¹ Appellant claimed that he never knew of Debtor's commingling of funds for his various construction projects or of any "incentive" payments received by Debtor from his subcontractors.²²

On March 31, 2005, the bankruptcy court entered judgment against the Debtor in the amount of \$4,000, the amount Appellants expended to discharge Comanche's filed lien and the extent to which Debtor failed to discharge his fiduciary duty and had made a defalcation under 523(a)(4).²³

¹⁷ *See* Exhibit 9, *in* App. II.

¹⁸ *Id.* *See also* Transcript at 47, 134-135, 141, *in* App. I at 94, 181-182, 188.

¹⁹ *See* Transcript at 153, *in* App. I at 200.

²⁰ *Id.* at 151, *in* App. I at 198. In this connection, we note that Appellants' counsel assured the Court at oral argument that the bankruptcy court found that Appellants had to pay \$56,000 to "complete" the project. That, in fact, is not the case. All the bankruptcy court found as fact was that the total cost of construction exceeded the price and that Debtor's evidence did not fully explain the disposition of funds advanced to him.

²¹ *Id.* at 150-151, *in* App. I at 197-198.

²² *Id.* at 153, *in* App. I at 200.

²³ *See* Judgment at 1, 5, *in* App. I at 33, 38.

The bankruptcy court held that under Oklahoma law, a contractor's fiduciary duty is to pay lienable claims, and only upon breach of such duty is an accounting required. The court found that Arvest had advanced \$76,298.02 to Debtor for the payment of Comanche's invoices, and that Debtor did not explain fully the disposition of those funds.²⁴

In construing the Construction Trust Fund Statutes, the bankruptcy court defined lienable claims to which a contractor's fiduciary duty is limited to those that have been perfected under Oklahoma law; *i.e.*, that are the subject of a filed sworn statement of lien in the county clerk's office within 90 days after the furnishing of the materials or labor at issue.²⁵ Since only one lien was filed – Comanche's – and satisfied, the bankruptcy court determined that only one claim was lienable.²⁶ The court noted that “[a]s unfair as it seems for laborers and materialmen to render services and supplies for the contractor who does not pay for them, the owner is not jeopardized by such failure unless the unpaid laborers or materialmen file a timely lien against the owner's property.”²⁷ The court also found that while Debtor did use the same subcontractors on Appellants' home as for other projects, because of Debtor's commingling of funds, the exact amount of funds deposited by Appellants for the construction of their home was not able to be determined.²⁸

The court found the evidence insufficient to charge Debtor with fraud under

²⁴ *Id.* at 3-4, *in App. I* at 36-37.

²⁵ *See* 42 O.S. § 143; Judgment at 10, *in App. I* at 43.

²⁶ Judgment at 11, *in App. I* at 44.

²⁷ *Id.*

²⁸ *Id.* at 4, *in App. I* at 37.

11 U.S.C. § 523(a)(2):²⁹

[Appellants'] argument and the legal authorities on which they rely pertain only to their § 523(a)(4) claim and not to their § 523(a)(2) claim. Further, there is a lack of evidence that [Debtor] committed fraud, made false representations, acted under false pretense or submitted a false financial statement within the meaning of § 523(a)(2). Thus, [Appellants] have either abandoned their § 523(a)(2) claim or failed to support it. Accordingly, the § 523(a)(2) claim will not be further considered in this opinion.³⁰

This appeal timely ensued.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.³¹ Neither party elected to have this appeal heard by the United States District Court for the Western District of Oklahoma; thus each has consented to our review. A decision is considered final “if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”³² In the present case, the Judgment resolved all outstanding issues raised by Appellants’ counsel. The matter is thus ripe for review.

III. Standard of Review

We review the bankruptcy court’s legal determinations *de novo* and its findings of fact under a clearly erroneous standard.³³ Nondischargeability of debt

²⁹ *Id.* at 4-5, in App. I at 37-38.

³⁰ *Id.* at 5, in App. I at 38.

³¹ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

³² *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

³³ *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997); Fed. R. Bankr. P. 8013.

is an issue of law to be reviewed *de novo*.³⁴ A finding of fact is clearly erroneous if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been committed.³⁵ Review under the standard is significantly deferential.³⁶

Two issues are raised in this appeal: whether the bankruptcy court erred when it 1) applied the Construction Trust Fund Statutes to limit its nondischargeability finding to the amount that was actually lienied by Comanche to the extent Debtor failed to satisfy such lien; *i.e.*, \$4,000, and 2) found insufficient evidence to support Appellants' § 523(a)(2) claim.

IV. Discussion

Appellants concede that the bankruptcy court reached the correct conclusion but argue that it did not go far enough in terms of excepting their claims from Debtor's discharge.³⁷ Appellants contend that an additional \$46,032.02 should be excepted from Debtor's discharge (the "Disputed Amount"), said sum representing:

1. \$39,532.02 – Debtor drew \$76,298.02 from February through April, 2002, for Comanche expenses.³⁸ The evidence shows only two payments made by Debtor to Comanche in the total amount of \$36,766, leaving a balance of \$39,532.02.³⁹
2. \$2,500 – relating to plumbing costs purportedly owed by Debtor to Gordon in connection with the February, 2002, draw request.
3. \$2,000 for a subsequent draw request Debtor made in June, 2002,

³⁴ *United States v. Victor*, 121 F.3d 1383, 1386 (10th Cir. 1997).

³⁵ *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 788 (10th Cir. BAP 1997).

³⁶ *Id.*

³⁷ *See* Appellants' Brief at 6, 8-9.

³⁸ Exhibit 19, *in* App. II.

³⁹ Exhibit 13, *in* App. II.

to pay Gordon; Debtor could not document the payment thereof.⁴⁰

4. \$2,000 relating to an alleged kickback added to Debtor's draw request for Davis Air Conditioning.⁴¹

The § 523(a)(2) claim

Despite having virtually ignored the actual fraud component of their claim below, Appellants now contend the Debtor's liability for their damages is a nondischargeable debt under § 523(a)(2) which provides:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt —

. . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by —

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

To sustain a claim under § 523(a)(2), the creditor must prove the debtor made a false representation with the intent to deceive the creditor; that the creditor reasonably relied on the misrepresentation; and the misrepresentation caused the creditor to sustain a loss.⁴² The creditor has the burden to prove each element of the claim by a preponderance of the evidence and doubts are resolved in the debtor's favor.⁴³

Appellants' § 523(a)(2) claim is based on Debtor's commingling and

⁴⁰ Exhibit 15, *in* App. II.

⁴¹ Exhibit 17, *in* App. II.

⁴² *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996).

⁴³ *Blue Ridge Bank and Trust v. Cascio (In re Cascio)*, 318 B.R. 567, 575 (Bankr. D. Kan. 2004), *aff'd without published opinion*, 2005 Bankr. LEXIS 1462 (10th Cir. BAP August 4, 2005); *see also Driggs v. Black (In re Black)*, 787 F.2d 503, 506 (10th Cir. 1986), *abrogated in part on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991).

overdraft of funds, his refusal to provide an accounting, and the dishonored payment to Comanche. Appellants argue that they satisfied the elements of common-law fraud under § 523(a)(2). However, the factual findings of the bankruptcy court may only be disturbed if clearly erroneous.⁴⁴ Nowhere in the record is there evidence of a false statement or misrepresentation by the Debtor to the Appellants. Nor is there the suggestion that Appellants somehow relied on Debtor's statements to their detriment. It is not even clear that Debtor breached the contract. Appellants' fraud allegation appears to us to be a catch-all designed to snare any actions by the Debtor not embraced by the more restrictive provisions of § 523(a)(4) and the Construction Trust Fund Statutes. General dishonesty of a debtor, while certainly not encouraged, is not enough to except a debt from discharge under § 523(a)(2).⁴⁵ The record supports the bankruptcy court's conclusions concerning § 523(a)(2) and we do not substitute our judgment for that of the trial court.

The bankruptcy court specifically found that "it cannot be determined from the evidence the exact amount of funds which were deposited [in the Arvest account] for the construction of [Appellants'] home." It also found that the evidence did not show "that [Debtor] committed fraud, made false representations, acted under false pretense or submitted a false financial statement within the meaning of § 523(a)(2)."⁴⁶ While there is evidence in the record that suggests that the Debtor spent something paid by Appellants on other projects, there is no evidence whatsoever that Debtor concealed this practice or that Debtor told Appellants he was doing something different. On this record, we cannot

⁴⁴ *In re Mullet*, 817 F.2d 677, 678 (10th Cir. 1987), citing *In re Branding Iron Motel, Inc.*, 798 F.2d 396, 399 (10th Cir. 1986).

⁴⁵ *Id.* at 682.

⁴⁶ Judgment at 5, *in App. I* at 38.

fairly say that there was no evidence in the record to support these findings, nor are we left with a definite and firm conviction a mistake has been made.⁴⁷ Not being clear error, the bankruptcy court's judgment on the § 523(a)(2) count is affirmed.

The § 523(a)(4) claim

At trial, the parties focused almost exclusively on the scope of Debtor's fiduciary duties to Appellants under the Construction Trust Fund Statutes and the extent to which Debtor had violated those duties. Section 523(a)(4) provides for exception to discharge "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"⁴⁸ Appellants argue that from January through June of 2002, funds from Appellants' construction account were transferred directly to Debtor's account, and that pursuant to 42 O.S. §§ 152 and 153, Debtor was acting in a fiduciary capacity with respect to all of those funds. Appellants contend that Debtor was obligated to provide an accounting of all the funds entrusted to him under the Construction Trust Fund Statutes and that he failed to do so.⁴⁹

The Construction Trust Fund Statutes provide in part:

152. Proceeds of building or remodeling contracts, mortgages or warranty deeds as trust funds for payment of lienable claims

(1) The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of *all lienable claims* due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract.

(2) The monies received under any mortgage given for the purpose of construction or remodeling any structure shall upon receipt by the mortgagor be held as trust funds for the payment of *all*

⁴⁷ *In re Seay*, 215 B.R. at 788.

⁴⁸ 11 U.S.C. § 523(a)(4).

⁴⁹ See Transcript at 182-193, *in App. I* at 235-240.

valid lienable claims due and owing or to become due and owing by such mortgagor by reason of such building or remodeling contract.

. . . .

153. Payment of lienable claims

(1) The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.⁵⁰

. . . .

On a question certified from a bankruptcy court sitting in Oklahoma, the Oklahoma Supreme Court held in *Stevens v. Harris (In re Harris)* that these statutes contemplate that when funds are paid into a contractor's construction account, the contractor holds them in trust for the owner for the payment of *lienable* claims.⁵¹ Nothing in the plain language of the Construction Trust Fund Statutes suggests the existence of a statutory fiduciary duty to account for all funds in the absence of such vendor claims. To argue as Appellants do that these statutes delegate such an expanded duty is an extension of *Harris* that we decline to make.

To some extent, the proof is in the pudding – if there are no liened or lienable claims at the conclusion of the contract, the contractor has fulfilled his fiduciary duty under the statute. Here, there was one liened claim, that of Comanche's for \$4,000.00, which formed the basis of the bankruptcy court's § 523(a)(4) Judgment against Debtor. In *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, this Court held that even negligent breaches of fiduciary duty may constitute "defalcation" under § 523(a)(4), and the bankruptcy court correctly applied that principle when it began its analysis to except a portion of

⁵⁰ 42 O.S. §§ 152-153 (2005) (emphasis added).

⁵¹ 49 P.3d 710, 718-719 (Okla. 2002).

Appellants' claim from Debtor's discharge.⁵² *Storie's* holding is based upon the public policy to protect the integrity of fiduciary relationships. "A fiduciary-trustee who is entrusted with funds under an express or technical trust as required under section 523(a)(4) has a legal duty to administer the trust solely in the interest of its beneficiaries, and to keep and render clear, accurate accounts with respect to the trust's administration."⁵³ Plainly, Debtor did not keep such accounts and as such, violated his fiduciary duty to Appellants, at least to the extent of \$4,000.00.

The bankruptcy court properly construed the Construction Trust Fund Statutes and did not include the Disputed Amount because no liens had actually been filed for these amounts and the time to file any such liens had passed. The bankruptcy court held that "the only relevant fiduciary duty here is that prescribed by the [C]onstruction [Trust] [F]und [S]tatutes, i.e., to pay lienable claims." Despite Appellants' claim that the bankruptcy court applied *Harris* and *Storie* too narrowly, we agree that "[i]f there are no lienable claims, there is nothing for which the contractor must account under these statutes"⁵⁴

To the extent Debtor failed to account for other funds had and received, there appears to be no trust or fiduciary relationship under Oklahoma law, nor was one imposed by the contract between the parties. The bankruptcy court's Judgment against the Debtor under § 523(a)(4) should be affirmed.

V. Conclusion

The bankruptcy court properly entered Judgment excepting \$4,000 from

⁵² 216 B.R. 283, 288 (10th Cir. BAP 1997) ("defalcation under § 523(a)(4) is a fiduciary-debtor's failure to account for funds that have been entrusted to it due to any breach of a fiduciary duty, whether intentional, wilful, reckless, or negligent.").

⁵³ *Id.* at 289 (citation omitted).

⁵⁴ Judgment at 10, *in App. I* at 43.

Debtor's discharge. We AFFIRM.